LEE KIM SENG v. ACME CANNING SENDIRIAN BERHAD

[F.C. (Lee Hun Hoe C.J. (Borneo), Ali Ag. C.J. (Malaya) and Raja Azlan Shah F.J.) May 19, 1977]
[Penang — Federal Court Civil Appeal No. 55 of 1976]

Industrial Law — Overtime wages — Work on rest days — Whether employee entitled to overtime wages — Express conditions of work — Extra benefits in lieu of overtime allowances — Employment Ordinance, 1955, ss. 6 and 7.

This was an appeal from the judgment of Arulanandom J. reported at [1977] 1 M.L.J. 252. The appellant had claimed $2,865.11 as overtime wages and double wages for working on rest days. He was employed as a foreman in the factory and had agreed to work as a monthly rated employee under terms and conditions which provided no limit in hours in return for such benefits as housing allowance, food allowance, bonus and incentive payments. The Labour officer, Butterworth had made an award in favour of the appellant but this had been set aside in the High Court. The appellant appealed to the Federal Court.

Held, dismissing the appeal: it was not open to the appellant to say that he had been deprived of the benefits of the Employment Ordinance having clearly admitted that he had been paid more than he would get, as overtime wages. The principle of approbation and reprobation or doctrine of election applied in this case.

Cases referred to:-

(1) *Eastern Mining and Metal Company Sdn. Bhd.* v. *M.M. Ismail & Ors.* [1976] 1 M.L.J. 166.

(2) *Lissenden* v. *C.A.V. Bosch Ltd.* [1940] A.C. 412.

FEDERAL COURT.

Ariffin bin Daud for the appellant.

S. Kulasegeran for the respondent.

Ali Ag. C.J. (Malaya): This is an appeal against the judgment of Arulanandom J. in the Penang High Court allowing an appeal by the respondent ACME Canning Sendirian Berhad against the decision or order of the Labour Officer, Butterworth under section 69 of the Employment Ordinance No. 38 of 1955 (hereinafter referred to as the Ordinance).

The following facts were not in dispute: The appellant, Lee Kim Seng, at all material times was employed as a supervisor in a food canning factory owned by the respondent. He worked for the Company since 1964 until his resignation sometime in November, 1972. His salary was $220/- per month in 1969 and $280/- per month in 1970, 1971 and 1972. In addition he was paid food, housing and travelling allowances amounting to $85/- per month, incentive payments, medical benefits and bonuses. Soon after his resignation on November 27, 1972 he complained to the Labour Officer, Butterworth that between October, 1969 and November, 1972 he had worked overtime for the Company but had not been paid any overtime wages. Based on 32 hours overtime per month since October, 1969 he claimed a total sum of $2,434.34¢.

His complaint came before the Labour Court for enquiry under section 69 of the Ordinance. The respondent resisted the claim on the ground that the appellant was not entitled to overtime wages as he has agreed or elected to be employed on terms that he would not claim overtime wages if at any time he was called upon to do work for more than eight hours a day. The need to work overtime on certain occasions was due to irregular supplies of raw materials such as fish. When there were large supplies of these raw materials daily production would be stepped up and workers had to work overtime.

As supervisor the appellant had to be present. Sometimes raw materials were in short supply and there would be less or no work in the factory. Daily rate workers were entitled to be paid overtime if they worked more than 8 hours a day. In the case of the appellant he had the choice of being employed either on daily rate, in which case he would be paid overtime wages for overtime work, or on monthly rate in which case apart from his monthly salary he would in lieu of overtime be paid other benefits such as food, housing and travelling allowances amounting to $85/- a month.

He chose to be on monthly rate. There was also evidence that he was paid incentive allowance and that before he left the services of the Company he was given $500/-. Since he had elected not to claim overtime no record of overtime work done by him was kept in the office of the Company. So when he went to the Labour Office with the complaint that he had not been paid overtime wages there was no official record to support his claim. What he produced were documents, C1 — C7, from which he sought to show that he had been working overtime since 1969. How he came by these documents is not at all clear. Assuming that he had ben keeping records since 1969 it is difficult to understand why all these while, while still in employment he made no attempt to claim overtime wages.

Although the learned judge did not deal with this point I must say that there was no satisfactory evidence to justify the award made by the Labour Officer. He awarded the appellant the sum of $2,865.11¢ ($2,434.34¢ for overtime wages for period October 10, 1969 to November 20, 1972 and $430.77¢ being double pay for work done on rest days during the same period).

The respondent's appeal to the High Court was allowed by Arulanandom J. who on the recorded evidence took the view that there was between the parties an oral contract of service to which sections 6 and 7 of the Ordinance are applicable so as to defeat the appellant's claim. As it seems to me section 6 is concerned with agreement or contract of service entered into before the date of the commencement of the Ordinance, i.e. June 1, 1957. Since the appellant did not join the respondent's service until after this date section 6 would not be applicable. On the evidence the appellant joined the Company sometime in 1964.

But the learned judge also gave another reason for allowing the appeal. He referred to the unreported case of *Eastern Mining and Metal Company Sdn Bhd.* v. *M.M. Ismail & Ors.*[1] as decided by the Federal Court following the decision in *Lissenden* v. *C.A.V. Bosch Ltd.*[2] The learned Lord President delivering the judgment of the Federal Court said this:

"In accordance with his contract of service the company was to pay him out of its right pocket, but instead it elected to pay him out of its left pocket. He insists that the company should also pay him out of its right pocket, notwithstanding that the amount already received by him from the left pocket is more than what he would have received from the right pocket. My answer to that is that in the circumstances of this case, he cannot claim to be paid out of both pockets."

Shortly stated, the principle of approbation and reprobation or doctrine of election as applied by the Federal Court was also applied by Arulanandom J. to this case which undoubtedly is a much stronger case than that decided by the Federal Court. Section 7 of the Ordinance makes void any attempt to contract out of the Ordinance if by such attempt the employee is deprived of his right to overtime wages for working overtime.

In the instant case it was not open to the appellant to say that he had been deprived of the benefits of the Ordinance having clearly admitted that he had been paid more than what he would get as overtime wages. This is so if the sum of $85/- a month is multiplied by the number of months from October, 1969 to November, 1972.

In view of the decision of the Federal Court I think the learned judge was right in deciding as he did in the instant case. I would, therefore, dismiss this appeal with costs.

Lee Hun Hoe C.J. (Borneo) and **Raja Azlan Shah F.J.** concurred.

Appeal dismissed.

Solicitors: *Ariffin & Co.; Ranjit, Thomas & Kula.*

PETER CHONG NGEN ONN & ORS. v. COL. ADAM BIN ABUBAKAR & ORS.

[F.C. (Suffian L.P., Raja Azlan Shah and Wan Suleiman F.JJ.) February 24, May 20, 1977]

[Kuala Lumpur — Federal Court Civil Appeal No. 139 of 1976]

Administrative Law — Application for order of prohibition to prohibit court martial from proceeding with hearing — No power to interfere with matters of military conduct — Court has no jurisdiction to interfere even if court martial not convened in accordance with Rules of Procedure — Malay Regiment Enactment (F.M.S. Cap. 42), ss. 21, 22 and 23.

Armed Forces — Military court — Matters relating to military law — Civil rights of a soldier — Civil court has no jurisdiction to interfere even if court martial not convened in accordance with rules of procedure.

In this case the appellants, members of the armed forces, applied to the High Court for an order prohibiting the court martial from proceeding with the hearing of charges against them under the Malay Regiment Enactment. It was alleged that the court martial had no jurisdiction or had exceeded its jurisdiction and had acted contrary to the general law of the land and to the rules of natural justice. The application was dismissed in the High Court and the appellants appealed to the Federal Court.

Held, dismissing the appeal: (1) the court will not intervene in matters relating to military law prescribing rules for the guidance of officers;

(2) the court could only interfere with military courts and matters of military law in so far as the civil rights of a soldier might be affected;

(3) therefore even if it is shown that a court martial had not been convened in accordance with the Rules of Procedure the court had no jurisdiction to interfere.

Cases referred to:-

(1) *The King* v. *Army Council, ex parte Ravenscroft* [1917] 2 K.B. 504.

(2) *R.* v. *Secretary of State, ex parte Martyn* [1949] 1 All E.R. 242.

The following authorities were also cited in argument: *Crane* v. *Deputy Public Prosecutor* [1921] A.C. 299; 15 Cr. App. R. 23, 183, *R.* v. *Dennis & Parker* 18 Cr. App. Rep. 39; [1924] 1 K.B. 867, *Scott* v. *Scott* [1913] A.C. 417, *Edwards* v. *East India Co.* (1840) 3 Ky. 6, *A. Gabriel & Anor.* v. *Public Prosecutor* [1957] M.L.J. 83, *R.* v. *Electricity Commissioners* [1924] 1 K.B. 171, 205, and *Tan Chwee Geok & Anor.* v. *Khaw Yen-Yen & Anor.* [1975] 2 M.L.J. 189.

FEDERAL COURT.

Datuk P. Suppiah for the appellants.

Tam Kam Weng (Senior Federal Counsel) for the respondents.

In the court below *Datuk P. Suppiah* appearing for the applicants and *S. Isaacs* (Federal Counsel) for the respondents, the following judgment was delivered on September 24, 1976:

Abdul Hamid J.: This is an application by way of Notice of Motion by four applicants, namely, Peter Chong Ngen Onn, Salleh bin Hussein, Taib bin Mohamed and Edwin Godfrey Johnson for the following orders and directions —

1. an Order of Prohibition to prohibit the Court Martial or its President and Members from proceeding further with the hearing of the charges against the first, second, third and fourth applicants under sections 23(ii), 22(i)(a) and 21(1) respectively of the Malay Regiment Enactment (F.M.S. Cap. 42) upon the grounds set forth in the statement accompanying the application; and
2. that the proceedings before the Court Martial be stayed until after the determination of this Motion.

Grounds upon which the relief is sought are as follows —

(A) That the Court Martial has no jurisdiction —

(1) to hear all four charges or any of them preferred in separate charge sheets as the Convening Officer failed in the convening order to direct that the applicants be tried on those charges as required by rule 48(1)(b) of the Armed Forces (Court Martial) Rules of Procedure, 1976;

(2) to try all the applicants jointly (as was ordered by the Court Martial) as —

(a) The Convening Officer did not direct that the applicants be tried jointly as required by R.P. 48(1)(d);

(b) The Convening Officer had placed the four charges on four separate charge sheets with a remark "to be tried by a Court Martial" on each charge sheet; and

(c) The offences against each of the applicants did not arise out of the same transaction.

(3) to try the applicants as they had not been remanded for trial by the said Court Martial by their Commanding Officer;

(4) to arraign all the applicants before deciding whether they were to be tried jointly on the four charges.